UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FANAYE TURNER, Plaintiff, v. UNIVERSITY OF WASHINGTON and, BUDDY RATNER, Defendants.	No. C05-1575RSL ORDER GRANTING IN PART, DENYING IN PART, AND RESERVING IN PART PLAINTIFF'S GENERAL MOTION IN LIMINE

This matter comes before the Court on "Plaintiff's General Motion In Limine" (Dkt. #26). In her motion, plaintiff presents thirteen separate issues for the Court's consideration. Having reviewed the memoranda, declarations, and exhibits submitted by the parties, and the remainder of the record, the Court finds as follows:

1. Collateral Source Benefits

Plaintiff moves to exclude any reference to collateral source benefits. See Motion at 2. This motion is unopposed by defendants and therefore plaintiff's motion is GRANTED. See Response at 1.

2. Defendants' Financial Status

Plaintiff moves to preclude defendants from presenting evidence of their "financial status, lack of insurance, insurance policy limits, or the effect of Plaintiff's claim on taxpayers or its

insurance rates." Motion at 3. This motion is unopposed by defendants and therefore plaintiff's motion is GRANTED. See Response at 1.

3. Settlement Negotiations/Offers to Compromise

Plaintiff moves to exclude "[r]eference to [compromise] negotiations and offers of settlement." Motion at 3. This motion is unopposed by defendants, subject to a reservation that if plaintiff moves to introduce a Tort Claim Letter dated July 23, 2004, defendants shall be granted the right to respond. See Response at 1. Plaintiff's motion is GRANTED subject to defendants' reservation regarding the July 23, 2004 letter.

4. Exclusion of Evidence Not Disclosed During Discovery

Plaintiff moves to exclude "evidence not disclosed by Defendant [sic] in their Initial Disclosures or in response to Plaintiff's discovery requests." Motion at 1. Plaintiff specifically seeks to exclude exhibits 563 and 659 contending that these exhibits were first presented in defendants' pretrial statement. See Motion at 4. The Court finds that these exhibits were disclosed to plaintiff before the close of discovery, and therefore plaintiff's motion is DENIED on this basis. See Response at 1; Dkt. #39 (Madden Decl.) at Ex. 4. Plaintiff also moves to exclude "any evidence regarding issues and documents for which defendants claimed attorney client or work product privilege, including any and all investigations, if any, undertaken by the Attorney General's office in response to Ms. Turner's internal complaints and tort claim." Motion at 4. Plaintiff, however, failed to identify and produce for the Court's review, the material to be excluded.

"The privilege which protects attorney-client communications may not be used both as a sword and a shield." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992). "In a similar vein, a party cannot introduce a document as evidence while denying the opponent sufficient discovery with respect to the surrounding circumstances and substance of the document." Merisant Co. v. McNeil Nutritionals, LLC, 242 F.R.D. 303, 311 (E.D. Pa. 2007)

(quotation marks and citation omitted). A privilege-holder "may elect to withhold or disclose, but after a certain point his election must remain final." Weil v. Investment / Indicators, Research and Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981) (quoting VIII J. Wigmore, Evidence § 2291, at 636 (McNaughton rev. 1961)). Consistent with this authority, the Court excludes material that was withheld in discovery based on a claim of attorney-client privilege or the work product doctrine. The Court, however, RESERVES ruling on the application of this ruling to specific exhibits until the time of trial given plaintiff's failure to produce the material for the Court's consideration as part of her motion in limine.

5. Medical Records

Plaintiff moves to exclude plaintiff's medical records "that contain inadmissible hearsay statements and inadmissible opinion evidence." Motion at 1. Plaintiff, however, fails to identify the specific records to be excluded on this basis, stating that "[i]t is because defendants introduce voluminous records that plaintiff made a broad motion to exclude." Reply at 2. In response, defendants contend "[w]ithout further specificity, it is virtually impossible for defendants' [sic] to meaningfully respond to this motion." Response at 2. The Court agrees, and RESERVES its ruling on a record-by-record basis for trial. Defendants' proposed introduction of "voluminous records" alone, is not a legitimate basis for plaintiff to file a pre-trial "broad motion to exclude."

6. Investigation and Human Resource Files

Plaintiff also moves to exclude "files" that she claims are irrelevant or suffer from other "evidentiary problems," including exhibits: 563, 596, 597, 612, 614, 620, 659, 663, 689, 711, 716, 717, 723, 739, 752, and 755. See Motion at 5-6. In ruling on a motion in limine, the Court must decide the merits of introducing a piece of evidence or allowing testimony without the benefit of the context of a trial. For this reason, Fed. R. Evid. 103 empowers the court to make "a definitive ruling on the record admitting or excluding evidence, either at or before trial."

Fed. R. Evid. 103(a) (emphasis added). Here, because the voluminous number of documents identified by plaintiff are not yet before the Court for review, the Court RESERVES ruling on the admissibility of these documents until they are individually offered at trial.

7. Underlying Statements of Witnesses Contained in Investigative and HR Files

Plaintiff moves to exclude, as inadmissible hearsay, the human resource and University Complaint Investigation and Resource Office ("UCIRO") investigative files and chronologies that contain underlying statements from witnesses. See Motion at 7. In response, defendants contend that the "underlying statements of witnesses contained in investigative and human resources files are not being offered to prove the truthfulness of the statements contained therein, but rather to show that defendants conducted an investigation related to issues in the workplace and what information the [d]efendant relied upon in making their decisions." Response at 5. Defendants also contend that the statements are being offered to demonstrate that defendants had a non-discriminatory basis for their actions, and what they relied upon in making their decisions related to Ms. Turner's claims against defendants." Id. The Court DENIES plaintiff's motion to exclude this material but GRANTS plaintiff's motion to the extent that the Court will not consider the material for the truth of the matters asserted.

8. The UCIRO findings

Plaintiff moves to exclude exhibit 715, the UCIRO investigation report because it is "biased" and because it is more prejudicial than probative under Fed. R. Evid. 403. See Motion at 7. The Court DENIES plaintiff's motion to exclude the UCIRO investigation report but GRANTS plaintiff's motion to the extent that the Court will not consider the material for the truth of the matters asserted.

9. Draft Termination Letters

Plaintiff moves to exclude draft termination letters prepared by defendant Ratner presented as trial exhibits 707, 708, 709, 729, and 740 because plaintiff contends they contain

inadmissible hearsay and they are prejudicial. See Motion at 8. The Court DENIES plaintiff's motion to exclude this material but GRANTS plaintiff's motion to the extent that the Court will not consider the material for the truth of the matters asserted.

10. Proposed Trial Exhibits 747, 748, and 756

Plaintiff moves to exclude trial exhibits 747, 748, and 756 as containing inadmissible hearsay. See Motion at 9. These exhibits consist of memos purportedly written by Jeri Staley-Earnst. See Dkt. #39 (Madden Decl.), Ex. 5. The Court DENIES plaintiff's motion to exclude this material but GRANTS plaintiff's motion to the extent that the Court will not consider the material for the truth of the matters asserted.

11. Affirmative Defense

In her reply, plaintiff states: "[p]laintiff does not make a sexual harassment claim against Dr. Ratner, but does claim retaliation arising from her objections to his advances. This claim was evident in the Complaint and defendant should be precluded from adding any new affirmative defenses." Reply at 6. In "Defendants' Motions In Limine" (Dkt. #23), they contend that plaintiff indicated for the first time in her pretrial statement that "she intends to make a claim '[a]gainst defendant Dr. Ratner – retaliation in violation of RCW 49.60 for objecting to unwanted acts and behaviors because of sex.'" Dkt. #23 at 6. Based on this, defendants assert in their response that they "should be allowed to defend under Faragher [v. City of Boca Raton, 524 U.S. 775 (1998)] on the basis that plaintiff failed to avail herself of the University's multiple internal mechanisms to address such complaints." Response at 9-10. The Court finds that plaintiff's retaliation claim arising from plaintiff's alleged objections to defendant Ratner's advances was not clearly pleaded. The allegations contained in paragraph 3.6 of the Complaint, titled "Rejection of Sexual Advances and Behaviors," were not tied to any specific cause of action. See Dkt. #2 (Complaint). And, plaintiff's retaliation claim, contained in paragraph 4.2 of the Complaint, only expressly identifies the "making of internal complaints

of discrimination" as a protected activity and does not specifically identify any "unlawful conduct." Id. Accordingly, it is reasonable that defendants did not construe the retaliation claim as including plaintiff's allegations concerning defendant Ratners' sexual advances and behavior. For this reason, the Court DENIES plaintiff's motion to exclude "new affirmative defenses."

12. Witnesses and Information Not Listed on Initial Disclosures

Plaintiff moves to exclude as witnesses Cynthia Long, Ramon Soliz, Alma Weightman, and Kahreen Tebeau because plaintiff contends that defendants failed to provide "good contact information until their pretrial statement." Motion at 9. Plaintiff also moves to exclude Margaret Kramer, Cheryl Cromer-Ratner, Cecilia Giachelli, Clare Hannan, Jenine Honjiyo, Julie Schmidt, and Jeannie Sprague because plaintiff contends that defendants failed to identify these witnesses in their initial disclosures or in response to plaintiff's interrogatories and requests for production. Id. In opposition, defendants claim that they provided plaintiff with the contact information they had available for the witnesses identified above, and the identities of the other witnesses became known during depositions in this case. Response at 10.

Under Fed. R. Civ. P. 37(c)(1), "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Rule 26(e)(1) provides that "[a] party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing" (emphasis added). Similarly, Local General Rule 3(a) states: "[i]f the court determines at the time of trial that any party has failed to reveal the name of a witness or disclose an exhibit in the pretrial order or during pretrial proceedings, the court may direct that the testimony of such

witness and/or such exhibit shall be inadmissible or may impose terms."

The Court finds that the contact information for Cynthia Long, Ramon Soliz, Alma Weightman, and Kathreen Tebeau was appropriately disclosed to plaintiff and therefore her motion to exclude these witnesses is DENIED. See Dkt. #39 (Madden Decl.) at Ex. 6, Attach. A. The Court also finds that the identities of Margaret Kramer, Cheryl Cromer-Ratner, Cecilia Giachelli, Clare Hannan, Jenine Honjiyo, Julie Schmidt, and Jeannie Sprague were made known to plaintiff during deposition testimony. Id. at Exs. 1-3; Response at 10-12. Therefore, plaintiff's motion to exclude these witnesses is also DENIED.

13. Imputation of Liability

Plaintiff moves to preclude defendant from offering evidence for the purpose of showing that defendant Ratner's position does not impute liability to the University of Washington ("UW"). See Motion at 10. Plaintiff makes this assertion based on her claim that defendants have already admitted imputation of liability to UW based on admissions in defendants' answer that defendant Ratner was "[t]he director of UWEB" and "the highest level manager of UWEB and the supervisor of Ms. Turner." Id.; Dkt. #2 (Complaint) at ¶1.3; Dkt. #5 (Answer) at ¶1.3. Defendants oppose this motion in limine because they contend that it calls for a ruling as matter of law that is not properly before the Court on plaintiff's motion in limine. Response at 12. The Court agrees. Whether or not there was a hostile work environment is a matter for trial. Plaintiff's argument that liability is appropriately imputed to UW based on the actions of defendant Ratner (to be presented at trial) and prior admissions is properly reserved for plaintiff's trial brief. Accordingly, plaintiff's motion in limine is DENIED.

For all of the foregoing reasons, "Plaintiff's General Motion In Limine" (Dkt. #26) is GRANTED IN PART, DENIED IN PART, and RESERVED IN PART.

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DATED this 10th day of October, 2007.

Robert S. Lasnik
United States District Judge